

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AARON DUMAS and EUGENE
BUNER, on Behalf of Themselves
and All Others Similarly Situated,

Case No.: 15cv1681 BTM(BLM)

ORDER GRANTING MOTION TO DISMISS

Plaintiff,

v.

DIAGEO PLC and DIAGEO-GUINNESS USA INC. .

Defendants.

Defendant Diageo-Guinness USA, Inc., has filed a motion to dismiss the Complaint for failure to state a claim.¹ For the reasons discussed below, Defendant's motion is **GRANTED**.

I. BACKGROUND

In this action, Plaintiffs Aaron Dumas and Eugene Buner allege that Defendants engaged in unfair and deceptive practices by misleading consumers

¹ On December 11, 2015, Plaintiffs filed a notice of voluntary dismissal of Defendant Diageo PLC.

1 into purchasing and overpaying for Red Stripe beer under the belief that the beer
2 was produced in Jamaica and imported.

3 The Complaint alleges that Red Stripe was first produced in Jamaica in 1938
4 and was brought to the United States in 1985. (Compl. ¶ 10.) In September 1993,
5 the predecessor to Defendant bought a controlling stake in D&G, the Jamaican
6 brewery with the rights to Red Stripe. (Compl. ¶ 11.) In 2012, Diageo moved
7 production of the U.S. supply of Red Stripe from Jamaica to the United States.
8 (Compl. ¶ 12.) Red Stripe is now made in Latrobe, Pennsylvania by City Brewing
9 Company. (Id.)

10 Plaintiff Aaron Dumas alleges that he bought Red Stripe six and twelve packs
11 as well as individual bottles from bars and restaurants. (Compl. ¶ 4.) Plaintiff
12 Eugene Buner alleges that he bought Red Stripe six and twelve packs. (Compl. ¶
13 5.)

14 Plaintiffs allege that although Red Stripe is no longer imported from Jamaica,
15 the new packaging for Rest Stripe “was specifically designed in order to maintain
16 the brand identity of Red Stripe as Jamaican beer.” (Compl. ¶ 14.) According to
17 Plaintiffs:

18 Nowhere on the cardboard packaging of Red Stripe does the label
19 indicate that Red Stripe is brewed in the United States with domestic
20 ingredients. In fact, the new packaging for Red Stripe boldly states
that it is a “Jamaican Style Lager” that contains “The Taste of Jamaica,”
and the packaging displays the distinctive D&G logo, despite the fact
that Red Stripe now originates from Latrobe, Pennsylvania – not

1 Jamaica.

2 (Compl. ¶ 14.)

3 Plaintiffs further allege that labeling on the bottles cannot even be seen
4 before twelve packs are purchased and cannot be seen in six-pack packaging
5 unless a bottle is removed and examined. (Compl. ¶ 15.) “Reasonable
6 consumers, including Plaintiffs, cannot or do not read the concealed fine print on
7 the bottles and cans until after they have already purchased Red Stripe.” (Id.)
8 Even then, the wording on the label is “ambiguous.” (Id.) The label on the bottles
9 states, “For over 80 years, Red Stripe has embodied the spirit, rhythm and pulse
10 of Jamaica and its people.” (Id.) “The only clue that Red Stripe is no longer a
11 Jamaican beer is that on the border of the new labels, in obscure white text, the
12 bottle says: “Brewed & Bottled by Red Stripe Beer Company Latrobe, PA.” (Id.)

13 Plaintiffs allege that Defendants’ misrepresentations cause confusion among
14 consumers who believe they are purchasing Jamaican beer, imported from
15 Jamaica, brewed using Jamaican ingredients. (Compl. ¶ 16.) Consumers are
16 willing to pay a premium for high-quality imported beer. (Compl. ¶ 20.) Plaintiffs
17 claim that as a result of Defendants’ deceptive packaging and labeling, consumers
18 such as Plaintiffs are deceived and induced into purchasing and overpaying for
19 Red Stripe. (Comp. ¶ 21.) Plaintiffs assert that if they had been made aware that
20 Red Stripe was not in fact an imported beer, they would not have purchased Red

1 Stripe, would have paid less for it, or would have purchased a different product.

2 (Id.)

3 Consumers are also allegedly harmed because retailers, restaurants, and
4 bars sell Red Stripe at higher prices under the false belief that it is still imported.

5 (Compl. ¶ 18.) The Complaint attaches copies of advertisements and websites
6 erroneously stating that Red Stripe is “imported” in support of this claim. (Ex. B to
7 Compl.)

8 Plaintiffs allege that as a result of their unfair and deceptive practices,
9 Defendants have collected millions of dollars from the sale of Red Stripe that they
10 would not otherwise have earned. (Compl. ¶ 23.) Plaintiffs bring this suit on behalf
11 of themselves and a purported class consisting of:

12 All consumers who purchased Red Stripe at retail in the state of
13 California for personal, family, and/or household purposes, and not for
14 re-sale, during the period that Red Stripe was not imported from
Jamaica, and within the four years prior to the Complaint filed in this
action (the “Class Period”).

15 (Compl. ¶ 24.)

16 The Complaint asserts the following claims: (1) violation of California’s Unfair
17 Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200 et seq.; (2) violation of
18 California’s False Advertising Law (“FAL”), Cal Bus. & Prof. Code § 17500 et. seq.;
19 (3) violation of California’s Consumers Legal Remedies Act (“CLRA”), Cal. Civ.
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1 Code § 1750 et seq.; (4) negligent misrepresentation; and (5) intentional
2 misrepresentation.

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4 **II. STANDARD**

5 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
6 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or
7 sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police
8 Dept., 901 F.2d 696, 699 (9th Cir. 1988). When reviewing a motion to dismiss, the
9 allegations of material fact in plaintiff's complaint are taken as true and construed
10 in the light most favorable to the plaintiff. See Parks Sch. of Bus., Inc. v.
11 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed factual
12 allegations are not required, factual allegations "must be enough to raise a right to
13 relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 555
14 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief'
15 requires more than labels and conclusions, and a formulaic recitation of the
16 elements of a cause of action will not do." Id. "[W]here the well-pleaded facts do
17 not permit the court to infer more than the mere possibility of misconduct, the
18 complaint has alleged - but it has not show[n] that the pleader is entitled to relief."
19 Ashcroft v. Iqbal, 565 U.S. 662, 679 (2009) (internal quotation marks omitted).

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1 Only a complaint that states a plausible claim for relief will survive a motion to
2 dismiss. Id.

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4 **III. DISCUSSION**

5 Defendant's primary argument in support of dismissing the Complaint is that
6 no reasonable consumer would be misled by the statements made on the Red
7 Stripe packaging and labeling. The Court agrees that no reasonable consumer
8 would be misled into thinking that Red Stripe is made in Jamaica with Jamaican
9 ingredients based on the wording of the packaging and labeling. Therefore, the
10 Court dismisses the Complaint on this ground and does not find it necessary to
11 reach Defendant's various other arguments.

12 Under the UCL, FAL, and CLRA, California consumer protection statutes,
13 the applicable standard for determining whether representations are deceptive is
14 the reasonable consumer standard. Williams v. Gerber Prods. Co., 552 F.3d 934,
15 938 (9th Cir. 2008); Consumer Advocates v. Echostar Satellite Corp., 113 Cal.
16 App. 4th 1351, 1360 (2003). The standard focuses on the perception of the
17 "normally credulous consumer" and asks whether the representation in question is
18 "likely to deceive" the consumer. Lavie v. Procter & Gamble Co., 105 Cal. App.
19 4th 496, 508 (2003). The California Court of Appeal explains:

20 "Likely to deceive" implies more than a mere possibility that the
advertisement might conceivably be misunderstood by some few

1 consumers viewing it in an unreasonable manner. Rather, the phrase
 2 indicates that the ad is such that it is probable that a significant portion
 3 of the general consuming public or of targeted consumers, acting
 4 reasonably in the circumstances, could be misled.

5 Id.

6 Generally, whether a business practice is deceptive is usually a question of
 7 fact which cannot be resolved on a demurrer or motion to dismiss. Williams, 552
 8 F.3d at 938. However, there are “rare situations” where it is appropriate to grant a
 9 motion to dismiss based on review of the advertisement or product packaging
 10 itself. Id. at 939. See also Werbel v. Pepsico, Inc., 2010 WL 2673860, at * 3 (N.D.
 11 Cal. July 2, 2010) (explaining, “[W]here a court can conclude as a matter of law
 12 that members of the public are not likely to be deceived by the product packaging,
 13 dismissal is appropriate.”)

14 The bottle trays for the twelve packs and six-bottle packs of Red Stripe
 15 contain the language “Jamaican Style Lager” and “The Taste of Jamaica.” (RJN
 16 Ex. A.)² The packaging also includes the D&G logo. The bottom of the packaging
 17 states, “Brewed and bottled by Red Stripe Beer Company Latrobe, PA.”

18 ² The Court grants Defendant’s Request for Judicial Notice as to Exhibits A-D. Although
 19 Plaintiffs do not object to the Court taking judicial notice of Exhibits A and D, they object to
 20 Exhibits B and C because they address products that are not at issue in this litigation. However,
 the documents bear relevance to the issue of confusion as to the phrase “Jamaican Style.” The
 documents are public records filed with the U.S. Department of the Treasury, Alcohol and
 Tobacco Tax and Trade Bureau (“TTB”) and United States Patent and Trade Office (“US PTO”)
 and are proper subjects of judicial notice under Fed. R. Evid. 201. Courts may take judicial
 notice of public record without converting a motion to dismiss into a motion for summary

1 Even if a consumer cannot be expected to see the language at the bottom
2 of the packaging, the Court finds that a reasonable customer would not be misled
3 by the visible packaging into believing that Red Stripe is brewed in Jamaica with
4 Jamaican ingredients. The mere fact that the word “Jamaica” and “Jamaican”
5 appear on the packaging is not sufficient to support a conclusion that consumers
6 would be confused regarding the origin and ingredients of the beer.

7 In Forschner Group, Inc. v. Arrow Trading Co., Inc., 30 F.3d 348, 355 (2d
8 Cir. 1994), the Second Circuit held that the phrase “Swiss Army knife” cannot fairly
9 be read to mean “made in Switzerland.” The Second Circuit explained:

10 The fact that a composite phrase contains a geographic term does not
11 necessarily mean that the phrase, viewed as a whole, is a geographic
12 designation. The question is whether the phrase can be construed to
mean that the product is made in a certain locale.

13 Id. The court reasoned that as used in the phrase “Swiss Army knife,” “Swiss” was
14 read more naturally to modify “Army” rather than “knife.” Id. at 356.

15 The packaging for both the twelve packs and six packs prominently states
16 “Jamaican Style Lager” in bold letters. On the twelve-pack bottle tray, this

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18 judgment as long as the facts noticed are not subject to reasonable dispute. Skilstaf, Inc. v. CVS
19 Caremark Corp., 669 F.3d 1005, 1016 n. 9 (9th Cir. 2012). Although Plaintiffs argue that the
20 Court should not take judicial notice of Defendant’s “assertion of what the contents mean,”
Plaintiffs do not dispute the fact that the Applications for Certificates of Label Approvals
(“COLAs”) in Exhibit B were filed with the TTB and the documents in Exhibit C are records of
registered trademarks with the US PTO.

1 language is directly to the left of the words “Red Stripe.” On the six-pack
2 packaging, the language is centered below the words “Red Stripe.”

3 Clearly, “Jamaican” modifies the word “Style” not “Lager.” The very fact that
4 the word “style” is used indicates that the product is *not* from Jamaica. “Type” is
5 used as a suffix to mean “of the specified type; typical or characteristic of . . .
6 *reminiscent or imitative of . . .*” (Emphasis added.)³ When used with a geographic
7 term to describe food or drink, the word “type” means that the food or drink is
8 prepared in a fashion that is similar to or reminiscent of that used in the identified
9 geographic area. For example, Blue Moon Brewing Company in Colorado brews
10 “Belgian-Style Wheat Ale,” Massachusetts-based Harpoon Brewery produced a
11 “Belgian Style Pale Ale,” and Cigar City Brewing produces “Cubano-Style
12 Espresso” brown ale in Florida. (RJN Ex. B.) Similarly, companies use “style”
13 designations such as “Turkish style,” “Australian style,” “Mumbai street style,” and
14 “European style” in connection with food and beverage products. (RJN Ex. C.) A
15 reasonable consumer would not believe that Mexican-style rice is made in Mexico
16 or that Italian-style sauce is imported from Italy.

17 As for “The Taste of Jamaica,” it seems that Plaintiffs take the phrase quite
18 literally and contend that the beer would have the taste of Jamaica if the ingredients

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20 ³ <http://www.oed.com/view/Entry/208334?rskey=5IYhvK&result=4&isAdvanced=false#eid>

1 actually came from Jamaica. However, “The Taste of Jamaica” is a vague and
2 meaningless phrase – who can say what Jamaica “tastes” like? When viewed
3 together with the phrase “Jamaican Style Lager,” a reasonable interpretation of the
4 phrase is that the beer is made in a way that people identify with Jamaica (either
5 a particular process and/or a certain recipe) and evokes the spirit or feeling of
6 Jamaica.

7 Plaintiffs point to the continued inclusion of the D&G logo on the packaging
8 as a source of confusion. However, the logo itself does not impart information
9 regarding the source of the product.⁴

10 In support of their position, Plaintiffs rely on Marty v. Anheuser-Busch
11 Companies, LLC, 43 F. Supp. 3d 1333 (S.D. Fla. 2014).⁵ In Marty, consumers of
12 Beck’s beer alleged that they were deceived into thinking they were purchasing
13 German beer, imported from Germany, and brewed using German requirements
14 and with German ingredients. The court found that representations that the beer
15 “Originated in Germany,” had “German Quality,” and was “Brewed under the

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17 ⁴ The Court doubts that the average consumer would know that the D&G logo is
18 associated with Desnoes & Geddes Limited, the Jamaican brewery, as opposed to, say, Diageo-
Guiness. At any rate, continued use of the logo, which has been associated with Red Stripe, is
not tantamount to a representation that Desnoes & Geddes brewed the beer.

19 ⁵ Plaintiffs also rely on an order denying a motion to dismiss in Suarez v. Anheuser-
20 Busch Companies, LLC, No. 13-033620, slip op. (Fla. Cir. Ct. Miami-Dade Cnty. Dec. 30, 2013).
(Pl. Ex. 5.) However, the order is a summary opinion that does not set forth reasons for the
decision and provides no guidance.

1 German Purity Law of 1516," when viewed with allegations of the defendant's
2 overall marketing campaign and Beck's 139-year history of being brewed in
3 Germany, were sufficient to conclude that a reasonable consumer may be misled
4 to believe that Beck's is an imported beer brewed in Germany. Id. at 1342.

5 Marty, however, is distinguishable. The term "Originated in Germany" could
6 be understood to mean that the beer came from Germany. Also, claims that the
7 beer was brewed under the Germany Purity Law of 1516 and that the beer is of
8 German quality makes it sound like the production of the beer was subject to
9 German law. The facts of the present case are not comparable.

10 To the extent Plaintiffs complain that representations on the packaging of
11 Red Stripe are not sufficient to alert consumers *who already have an*
understanding and expectation that Red Stripe is brewed in Jamaica that
13 production of the beer has been moved to Pennsylvania, the Court is unaware of
14 any authority supporting the proposition that Defendant would have a heightened
15 duty to counter those pre-conceived notions. Consumers who used to buy Red
16 Stripe when it was made in Jamaica might very well continue to buy the product
17 without bothering to read the packaging or labeling under the assumption that it is
18 still brewed in Jamaica. Plaintiffs have not established that Defendant is under a
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1 duty to completely change the packaging or include words such as “DOMESTIC”
2 or “local ingredients” to alert such consumers of a change.⁶

3 It is unclear to what degree, if at all, the Complaint rests on the labeling of
4 the bottles. The Complaint alleges, “Reasonable consumers, including Plaintiffs,
5 cannot or do not read the concealed fine print on the bottles and cans until after
6 they have already purchased Red Stripe. Even then, the print on the label is
7 ambiguous and difficult to read.” (Compl. ¶ 15.) The bottles can be removed from
8 the six packs before purchase, but it is unclear whether Plaintiffs did so.

9 At any rate, the language on the bottle labels would not lead a reasonable
10 consumer to believe that Red Stripe is made in Jamaica with Jamaican ingredients.
11 Like the packaging of the twelve packs and six packs, the bottle label includes the
12 language “Jamaican Style Lager” under the “Red Stripe” label in addition to the
13 D&G logo. (Ex. A to Compl.) On the back of the label are the words: “For over
14 80 years . . . Red Stripe has embodied the spirit, rhythm and pulse of Jamaica and
15 its people.” This language is a vague, colorful expression of Red Stripe’s
16 association with Jamaica and cannot reasonably be construed as a designation of
17 origin. Furthermore, on the edge of the label are the words “Brewed & Bottled by

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20 ⁶ The Complaint points to bar menus that list Red Stripe as imported beer. (Ex. B to
Compl.) The Court does not find this evidence to be persuasive. These bars may have listed
Red Stripe as imported prior to 2012 and may never have taken note that Red Stripe should be
moved to the domestic category.

1 Red Stripe Beer Company Latrobe, PA." Although the words are small, the
2 contrasting white print is legible. It is likely that anyone examining the label
3 carefully enough to read the language on the back of the label would see that the
4 beer is brewed and bottled in Pennsylvania. See Pernod Ricard USA, LLC v.
5 Bacardi U.S.A., Inc., 653 F.3d 241, 253 (3d Cir. 2011) (explaining that even if the
6 words "Havana Club" on bottle of rum could be understood as indicating the
7 product's geographic origin in Havana, Cuba, "those same words cannot mislead
8 a reasonable consumer who is told in no uncertain terms that 'Havana Club' is a
9 brand of rum made in Puerto Rico."); Piazza's Seafood World, LLC v. Odom, 448
10 F.3d 744, 753 (5th Cir. 2006) (holding that Piazza's use of "Cajun Boy" and "Cajun
11 Delight" trade names on seafood products imported from overseas was not
12 actually misleading because Piazza labels its products with their country of origin).

13 Because the Court finds that no reasonable consumer could be misled by
14 the packaging or bottle labels into thinking that Red Stripe is brewed in Jamaica
15 with Jamaican ingredients, the Court grants Defendant's motion to dismiss as to
16 Plaintiffs' UCL, CLRA, and FAL claims. The Court also grants Defendant's motion
17 to dismiss as to Plaintiffs' negligent misrepresentation and intentional
18 misrepresentation claims because the facts do not establish any misrepresentation
19 by Defendant.

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1 **IV. CONCLUSION**

2 For the reasons discussed above, Defendant's motion to dismiss is
3 **GRANTED**, and Plaintiffs' Complaint is **DISMISSED**. Plaintiffs cannot state a
4 claim for deception or misrepresentation based on the Red Stripe bottle labels or
5 packaging for the 12-packs or 6-packs. However, the Court will grant Plaintiffs
6 leave to amend the Complaint to assert claims based on other facts. If Plaintiffs
7 choose to amend their Complaint, they must file their amended complaint within
8 15 days of the filing of this Order.

9 **IT IS SO ORDERED.**

10 Dated: April 6, 2016


Barry Ted Moskowitz, Chief Judge
United States District Court